

HEALTH BOARD (MEMBERSHIP AND ELECTIONS) (SCOTLAND) BILL

EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

CONTENTS

1. As required under Rule 9.3 of the Parliament's Standing Orders the following documents are published to accompany the Health Board (Membership and Elections) (Scotland) Bill introduced in the Scottish Parliament on 25 June 2008:

- Explanatory Notes;
- a Financial Memorandum;
- a Scottish Government Statement on legislative competence; and
- the Presiding Officer's Statement on legislative competence.

A Policy Memorandum is printed separately as SP Bill 13–PM.

EXPLANATORY NOTES

INTRODUCTION

2. These Explanatory Notes have been prepared by the Scottish Government in order to assist the reader of the Bill and to help inform debate on it. They do not form part of the Bill and have not been endorsed by the Parliament.

3. The Notes should be read in conjunction with the Bill. They are not, and are not meant to be, a comprehensive description of the Bill. So where a section or schedule, or a part of a section or schedule, does not seem to require any explanation or comment, none is given.

THE BILL

4. The Bill will introduce, by way of pilots, elections to Health Boards in Scotland.

5. The Bill changes the constitution of Health Boards in Scotland and in particular changes the way some individuals become members of these Boards by introducing a system of elections whereby a proportion of the membership of each Health Board will be made up of elected members. The Bill also, for the first time, sets out on a statutory basis the membership of local authority councillor members on Health Boards and specifies that there must be at least one member per local authority within a Health Board area.

6. The Bill therefore makes a number of amendments to Schedule 1 to the National Health Service (Scotland) Act 1978 (the “1978 Act”) so as to change the make-up of Health Boards and inserts a new Schedule 1A into that Act setting out the framework for the elections.

7. The Bill provides for these changes to be introduced in certain areas on a pilot basis and provides for those pilot schemes to be evaluated before the changes are rolled-out to other areas.

8. The changes to Schedule 1 to the 1978 Act will not extend to Special Health Boards (these are Boards with special functions operating across Scotland as a whole). These Boards are set up by orders under the 1978 Act which commonly apply the provisions in Schedule 1 to that Act with appropriate modifications. Those orders will be amended where necessary to ensure that the new provisions inserted by this Bill are not applied to any Special Health Boards.

9. The Bill also extends the power of the Scottish Ministers to remunerate Health Board members to include power to remunerate members of committees and sub-committees of a Health Board.

COMMENTARY ON SECTIONS

Section 1 – Constitution of Health Boards

10. This section amends Schedule 1 to the 1978 Act. That Schedule currently contains provision about the constitution of Health Boards. In particular, it contains provisions about the

appointment of Health Board members (who are currently all appointed by the Scottish Ministers in accordance with this Schedule).

11. Subsection (2) substitutes a new paragraph for the existing paragraph 2 of Schedule 1 to the 1978 Act. New paragraph 2(1) specifies the three different types of member that will comprise a Health Board. These are—

- “appointed members” (a chairman and other members appointed by the Scottish Ministers);
- “councillor members” (councillors appointed by the Scottish Ministers following nomination by local authorities in the area of the Health Board); and
- “elected members” (individuals elected as members of the Health Board at an election).

Note that the chairman must always be an appointed member.

12. New paragraph 2(2) provides that regulations must specify, in respect of each Health Board in Scotland, the total number of members of the Board and the number of that total which is to be represented by each type of member. Those numbers will differ from Board to Board.

13. New paragraph 2(3) provides that (a) the total number of councillor members and elected members of a Health Board must amount to more than half the total number of members and (b) a Board must contain at least one councillor member from each local authority whose area is wholly or partly within the area of the Health Board. So the regulations cannot specify numbers which would not be in accordance with those two conditions.

14. New paragraph 2(4) provides that these conditions do not apply during any period when an elected member or councillor member vacates office and the vacancy has not been filled. This ensures that in the event of a vacancy arising the Health Board will still be able to carry out its functions.

15. Subsection (3) amends paragraph 2A of Schedule 1 to the 1978 Act to ensure that it continues to be a requirement in the case of a prescribed Health Board that at least one of the appointed members must hold a post in a university with a medical or dental school. A “prescribed Health Board” is one which is prescribed in regulations as requiring a member holding one of these posts. Currently these are the Health Boards which have at least one university in their area with a medical or dental school.

16. Subsection (4) amends paragraph 3 of Schedule 1 to the 1978 Act to ensure that it continues to be a requirement that appointed members may be appointed only after consultation with universities and other relevant organisations. It also removes the existing sub-paragraph (a) of paragraph 3 to remove the requirement to consult each local authority in the area of the Health Board concerned. This is because local authorities will have their own councillor members. Under the current arrangements, the Scottish Ministers would normally appoint at least one councillor to each Health Board. Existing paragraph 3(a) ensured that such an appointment

could not be made without the local authority being consulted. New paragraph 2 of the Schedule now provides for local authorities to nominate the councillor member to be appointed.

17. Subsection (5) inserts new paragraph 10A into Schedule 1 to the 1978 Act. New paragraph 10A(1) sets out the usual period that an elected member holds office for and paragraph 10A(2) provides that regulations may specify the circumstances in which (a) an elected member must vacate office before the end of that period and (b) the Scottish Ministers may determine that an elected member is to vacate office before the end of that period. So the regulations may set out some things which would lead to an individual having to leave office as a Health Board member and others which would lead to the Scottish Ministers making a decision as to whether or not the individual could remain in office.

18. Subsection (6) amends paragraph 11(a) of Schedule 1 to the 1978 Act to ensure that it continues to be the case that regulations may make provision about the appointment, tenure and vacation of office of appointed members. This will also apply to councillor members. Further amendment has been made to ensure that the power in relation to these members can be used to make similar provision as may be made in relation to elected members under new paragraph 10A(2).

19. Subsection (7) amends paragraph 12 of Schedule 1 to the 1978 Act to ensure that it continues to be the case that the proceedings of a Health Board are not invalidated by any vacancy in membership or by any defect in the appointment of any member. This will also apply to councillor members and elected members.

Section 2 – Health Board elections

20. Subsection (1) inserts new subsection (10A) into section 2 of the 1978 Act. New subsection (10A) provides that Schedule 1A will make provision for the elections of individuals to be members of Health Boards.

21. Subsection (2) inserts new Schedule 1A into the 1978 Act, which makes provision for Health Board elections.

22. Paragraph 1 provides that an election held under Schedule 1A is known as a “Health Board election”.

23. Paragraph 2 provides for the timing of Health Board elections. It provides that election regulations will specify the day on which a Health Board must hold the first election in the Health Board area. This day could be different for different Health Board areas. Health Board elections will be held on a fixed 4 year cycle. However, a Health Board election may be held in a Health Board area before the day specified if the Scottish Ministers make an order under section 77 of the 1978 Act to declare that a Health Board is in default.

24. Paragraph 3 provides for electoral wards. It provides that each Health Board area is to be comprised of a single electoral ward unless election regulations specify that a Health Board area is to be divided into more than one ward. If regulations specify such a division then they must

also specify the number of wards and the boundaries of those wards. Also, before regulations specifying such a division are made, the Scottish Ministers must consult the Local Government Boundary Commission for Scotland and the Commission must give them advice about the boundaries of the wards.

25. Paragraphs 4 to 8 deal with the conduct of elections. Paragraph 4 provides that the Health Board must appoint a returning officer for a Health Board election and sets out that election regulations will make provision about the tenure and vacation of office of a returning officer, the functions of a returning officer, the payment of a returning officer's fees and expenses, and any other matters relating to the returning officers as the Scottish Ministers consider appropriate.

26. Paragraph 5 provides that the nomination of a candidate must be made within the period specified in election regulations and in accordance with any other requirements made in those regulations. It also provides that a candidate may withdraw from a Health Board election at any time before the end of the nomination period set out in regulations.

27. Paragraph 6 provides that election regulations must specify the number of elected members to be elected in each electoral ward.

28. Paragraph 7 makes provision for uncontested elections. If, at the end of the nomination period, the number of nominated candidates in an electoral ward is equal to or less than the number to be elected for that ward then—

(a) the Health Board election is not to be held in the ward, and

(b) on the day on which the election was supposed to be held, the returning officer must—

(i) declare the nominated candidates (if there are any) to be deemed to have been elected as elected members for the ward (so they are all effectively elected without a vote being held), and

(ii) if the number of nominated candidates is less than the number that is to be elected for that ward, declare the number of vacancies in the ward.

29. Paragraph 8 makes provision for contested elections. The number of members that are to be elected for a ward are to be elected at a poll. Sub-paragraph (2) provides that at the poll, each individual entitled to vote may do so by marking on the ballot paper the voter's first preference from among the candidates. The voter can then express a second preference for another candidate and, if the voter wishes, subsequent preferences from amongst the candidates. This is the basic structure of a single transferable vote (STV) system. Sub-paragraph (3) states that election regulations must, in particular, make provision about the manner in which and period during which votes may be cast (for example, postal voting, electronic voting, or traditional ballots at polling stations), the form and content of ballot papers, the manner in which the number of votes which will secure the return of a candidate as an elected member is to be calculated (that is to say, the mathematical formula to be used in the STV system), the procedure for counting votes, and the declaration of the result of the poll.

30. Paragraph 9 makes provision about the eligibility of individuals to be candidates. It provides that election regulations may make provision about who is qualified to be a candidate in a Health Board election, and the circumstances in which an individual may be disqualified from being a candidate.

31. Paragraph 10 makes provision about entitlement to vote (in other words, the franchise of Health Board elections). It provides that an individual is entitled to vote at a Health Board election if the individual is aged 16 and over and meets any further criteria specified in election regulations. It provides that election regulations may determine, or set out the criteria for determining, the electoral ward in which an individual is entitled to vote. It also provides that an individual cannot vote more than once in the same Health Board area, nor in more than one Health Board area .

32. Paragraph 11 makes provision about election expenses. It provides that election regulations may make provision about the expenses which may be incurred by any person in connection with the Health Board election.

33. Paragraph 12 deals with what happens when there is a vacancy amongst the elected members of a Health Board. It applies if a returning officer declares a vacancy in an electoral ward due to an insufficient number of candidates and also if an elected member vacates office before the end of the usual period. It provides that the Scottish Ministers may direct the Health Board with the vacancy to invite an unelected candidate to fill the vacancy (election regulations can set out criteria for determining which unelected candidate is to be invited) or alternatively the Scottish Ministers can appoint an individual to fill the vacancy. Clearly the first of these options would not be available if the vacancy arose due to an insufficient number of candidates in the first place.

34. If a vacancy arises less than 6 months before the date of the next scheduled Health Board election in the Health Board area where it arises, the Scottish Ministers may, instead of taking action to direct the Health Board to invite an unelected candidate or appoint an individual to fill the vacancy, direct the Health Board to leave the vacancy unfilled until the next Health Board election in the Health Board area (paragraph 12(3)). Paragraph 12 also provides that an individual who fills a vacancy is to be treated as if that individual was an elected member of the Health Board (sub-paragraph (4)).

35. Paragraph 13 confers power on the Scottish Ministers to make election regulations. It provides that the Scottish Ministers may make election regulations in relation to any matter specified in new Schedule 1A as something in relation to which provision may be made by election regulations. It also provides that the election regulations may make further provision about Health Board elections (if it is something not already provided for in new Schedule 1A). It also provides that election regulations may apply an enactment (with or without modifications specified in the regulations) or disapply an enactment to Health Board elections.

Section 3 – Scottish Ministers powers in relation to elected members

36. Section 3 amends section 77(2) of the 1978 Act to ensure that when an order is made to declare a Health Board to be in default the order must not only provide for the appointment of

new members, but also must make provision for an election and may make provision about what is to happen in the period until the election is held.

Section 4 – Pilot scheme

37. Subsection (1) provides that the Scottish Ministers may by order appoint a day on which sections 1 to 3 are to come into force in respect of the Health Board areas specified in the order. An order under this provision is known as a pilot order. It is not subject to any parliamentary procedure as it is a commencement order.

38. Subsection (2) provides that the Scottish Ministers may make one pilot order only, although this does not affect their power to modify or revoke the order.

39. Subsection (3) provides that the pilot order may bring sections 1 to 3 into force with such modifications as the Scottish Ministers consider appropriate.

Section 5 – Report on pilot scheme

40. Subsection (1) provides that no later than 5 years after the first election held in a Health Board area specified in the pilot order, the Scottish Ministers must publish a report. The report must contain the following things—

- (a) a description of the changes made to the 1978 Act by sections 1 to 3 and how the constitution of Health Boards was changed by those sections coming into force in the Health Board areas specified in the pilot order,
- (b) a description of the Health Board elections held in the Health Board areas, and
- (c) an evaluation of—
 - (i) the level of public participation in the Health Board elections, and
 - (ii) whether having elected members on Health Boards led to increased engagement with patients and other members of the public in the specified Health Board areas.

41. Subsection (2) provides that the report may contain such other information, and an evaluation of such other matters, as the Scottish Ministers consider appropriate.

42. Subsection (3) provides that the Scottish Ministers must lay a copy of the published report before the Scottish Parliament.

Section 6 – Termination of pilot scheme

43. Subsection (1) provides that the pilot order can only stay in force for 7 years after the day the first election is held in a Health Board area specified in the pilot order. But the Scottish Ministers could revoke the pilot order on an earlier date.

44. If the pilot order is revoked before a roll-out order is made under section 7 of the Bill, then, on the day the pilot order is revoked, sections 1 to 7 and paragraph 2 of the schedule are repealed

(subsection (2)). This means that in order for the main provisions of the Bill to continue to have effect in the areas specified in the pilot order, a roll-out order has to be made before the pilot order is revoked (note that the pilot order is automatically revoked under subsection (1) at the end of the 7 year time-limit). Another effect of the self-repealing provision of subsection (2) is that it would no longer be possible to bring the main provisions of the Bill into force in areas not specified in the pilot order.

Section 7 – Roll-out

45. Subsection (1) provides that the Scottish Ministers may by order appoint a day on which sections 1 to 3 are to come into force in respect of Health Board areas not specified in the pilot order. Such an order is known as a “roll-out order”. When a roll-out order is made it has the effect of repealing section 6 of the Bill (see subsection (2) of section 7). Repealing section 6 prevents the pilot order from being revoked after the expiry of the time limit in section 6(1) and therefore also stops the consequential repeal of the main provisions of the Bill under section 6(2). This means that sections 1 to 7 and paragraph 2 of the schedule will continue to have effect in respect of the Health Board areas specified in the pilot order and there is no bar on bringing those provisions into force in other areas.

46. Subsection (3) provides that a statutory instrument containing a roll-out order may not be made unless the evaluation report has been published, and that statutory instrument is subject to negative procedure in the Scottish Parliament.

47. Subsection (4) provides that a roll-out order may make such provision adding to, replacing or omitting any part of the text of, or otherwise modifying any enactment as the Scottish Ministers consider appropriate. One of the things that could be done under this power is amendment of new Schedule 1A to the 1978 Act in response to the evaluation of the pilot schemes. For example, where elements of the process have been seen to work less well in the pilot areas, changes could be made to the way the process works by amending Schedule 1A for the Health Boards which did not participate in the pilot scheme (where elections would be held for the first time) and for the pilot scheme Boards (in relation to the subsequent elections for those Boards).

Section 8 – Minor and consequential amendments

48. Section 8 introduces the schedule which contains minor and consequential amendments.

Schedule – Minor and consequential amendments

National Health Service (Scotland) Act 1978 (c.29)

49. Paragraph 1 amends paragraph 4 of Schedule 1 to the 1978 Act to extend the power in that paragraph which permits the Scottish Ministers to pay to the chairman of a Health Board and such other members of a Health Board as may be set out in regulations such remuneration as they may from time to time determine. The power is extended to include such members of committees and sub-committees of a Health Board as regulations may specify.

Public Appointments and Public Bodies etc. (Scotland) Act 2003 (asp 4)

50. Paragraph 2 amends schedule 2 to the Public Appointments and Public Bodies etc. (Scotland) Act 2003 to exclude from the remit of the Commissioner for Public Appointments in Scotland the appointment to any Health Board of—

- (a) councillor members, and
- (b) appointed members who are appointed by virtue of the member either—
 - (i) holding a post in a university with a medical or dental school,
 - (ii) being employed as an officer of the Health Board (for example, the chief executive of the Health Board), or
 - (iii) being a member of a body set up by a Health Board which represents healthcare professionals working in the Health Board area. This covers representative forums set up by Health Boards to allow them to consult with doctors, dentists, opticians, pharmacists and other professionals in the area. These bodies are currently known as Area Clinical Forums.

Section 9 – Key terms

51. Section 9 defines the key terms used in the Bill.

Section 10 – Orders

52. Subsection 10(1) provides that an order under the Bill is to be made by statutory instrument.

53. Subsection (2) provides that such an order may make different provision for different purposes and contain any supplementary, incidental, consequential, transitional, transitory or saving provision which the Scottish Ministers consider appropriate.

Section 11 – Commencement

54. Subsection (1) provides that sections 1 to 3 come into force in accordance with sections 4 and 7 (that is, the provisions relating to the pilot scheme and roll-out respectively).

55. Subsection (2) provides that sections 4 to 7 and 9 to 12 come into force on Royal Assent.

56. Subsection (3) provides that sections 8 and the schedule come into force on such day as the Scottish Ministers may by order appoint (a commencement order under this subsection is not subject to any parliamentary procedure).

FINANCIAL MEMORANDUM

INTRODUCTION

57. This document relates to the Health Board (Membership and Elections) (Scotland) Bill introduced in the Scottish Parliament on 25 June 2008. It has been prepared by Nicola Sturgeon, who is the member in charge of the Bill, to satisfy Rule 9.3.2 of the Parliament's Standing Orders. It does not form part of the Bill and has not been endorsed by the Parliament.

COSTS ON THE SCOTTISH ADMINISTRATION

58. The costs associated with this Bill and the implementation of the pilots are modest in the context of current NHS spending in Scotland of over £10bn per annum. These costs are based on 60% turnout; using the STV voting system; using an all postal ballot and are based on pilots which cover 20% of the electorate of Scotland. The costs provided are a best estimate based on studies of postal ballots conducted by the Electoral Commission and experience of postal ballots for Scotland's National Parks Authorities. There are a number of variables which would cause the costs to fluctuate if they were adjusted. Precisely specifying the margins of such fluctuations would not be particularly productive. However it is reasonable to presume that an adjustment in any of the variables would result in a proportionate adjustment in the expected costs. For example, if the turnout is only 50%, the costs will be proportionately less because of reduced postage costs for the return of the postal ballots; if an STV system was not used then there would be a saving against the cost of hiring counting machines for the votes; and if a traditional ballot box were used then there would be a corresponding saving compared with postage for an all postal ballot.

59. The total electorate in Scotland is around 3.87m. On the basis of 20% coverage of the electorate in the 2 pilot areas this would equate to around 775,000 electors. The average cost per vote cast in all postal ballots (not using STV) is around £2.60. This is an average figure based on a number of evaluation studies of all postal ballots conducted by the Electoral Commission and takes account of the costs associated with non returned ballot papers. If we assume a 60% turnout in the pilot elections this would give an estimated cost of: 464,000 (60% of electorate) x £2.60 = £1.21 million. To this "baseline figure" would need to be added the costs of hiring the machines to count the votes in the STV system. The cost of the machines is very broadly dependent on the size of the electorate. The costs that follow are based on pilots in medium sized health board areas ie with an electorate of around 200-250,000. The estimated cost for hiring machines for 2 pilot areas would be around £450,000 x 2 = £0.90 million. The estimated cost of pilot elections to Health Boards in 2 pilot areas, using STV with a 60% turnout would be £1.21 million + £0.90 million = **£2.11 million**.

60. This cost (£2.11 million) does not include:

- the remuneration costs of elected members;
- the cost of the evaluation study;
- any possible costs arising from extending the franchise; or
- any possible costs which we may wish to incur in providing advance information and advice for the public in the 2 pilot areas.

61. The costs associated with remunerating the elected members are based on the expectation that for the 2 pilot areas there would be around 20 elected members. These members would be remunerated at the current rate (around £7,500 pa). The cost would be $20 \times £7,500 = £0.15$ million pa – over 2 years for the pilots £0.30 million. However this would be offset by a reduction in the number of lay members on each Board although, as a result of the introduction of elected members onto the Health Board, there may be an increase in size and a rebalancing of representation on the Board. So the increase in remuneration costs will not be completely offset and the estimated total additional remuneration over 2 years is expected to be around £0.20 million. For each pilot area Board this will mean additional annual remuneration costs of around £50,000. The actual cost incurred will depend on the pilot areas chosen.

62. The estimated cost of the evaluation study will be around £0.25 million. This cost is broadly based on costs of similar work undertaken/commissioned by the Scottish Government in the recent past.

63. With regard to the costs of extending the franchise we cannot be precise at this stage. There are a number of different software systems used by Electoral Registration Offices (EROs) across Scotland and the costs associated with modifying the software to accommodate the extension will depend on the pilot area chosen and the software in use by the EROs covering the pilot areas. A rough estimate of the cost may be around £50,000 per pilot area ie £0.10 million for 2 pilot areas.

64. It would be prudent, given the pioneering nature of these pilot elections, to allow for some investment in public information/advice in the pilot areas. This would help ensure public understanding and support and may help boost the turnout and may amount to £0.10m for each pilot area ie £0.20 million for 2 pilot areas. It is anticipated that this level of funding would allow for a modest advertising campaign in the local press and for the production and distribution of written information.

65. The total cost of the pilots is likely to be met in 2010/11 and takes into account the factors set out above and is made up as follows:

£1.21 million “baseline” cost
£0.90 million cost of STV counting
£0.20 million additional remuneration
£0.25 million evaluation study
£0.10 million extension of the franchise
£0.20 million public information and advice
£2.86 million

66. If, following the evaluation of the pilots, Ministers bring forward to Parliament plans to roll out elections to all Health Boards then it is estimated that this will cost around £13.05m. This is the £2.61m cost (excluding the evaluation study) for the 20% electoral coverage in the 2 pilot areas multiplied up to 100% coverage i.e. £2.61 million x 5 = £13.05m. This cost will be met at each election to Health Boards. The intention is that the costs will be met from existing budgets.

67. The Scottish Government has no plans at this time to use the power inserted by paragraph 1 of the schedule to the Bill to pay committees and sub-committees of Health Boards but regards this Bill as the right opportunity to make provision for such a power so that the issue can be looked at in light of the new structure of Boards. In the event of that resulting in subordinate legislation specifying that payments be made to any particular committee or sub-committee the Government will provide a full analysis of the costs arising.

COSTS ON LOCAL AUTHORITIES

68. There are no costs falling to local authorities.

COSTS ON OTHER BODIES, INDIVIDUALS AND BUSINESSES

69. There are no costs falling to other bodies, individuals and businesses.

SCOTTISH GOVERNMENT STATEMENT ON LEGISLATIVE COMPETENCE

70. On 25 June 2008, the Cabinet Secretary for Health and Wellbeing (Nicola Sturgeon) made the following statement:

“In my view, the provisions of the Health Board (Membership and Elections) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

PRESIDING OFFICER’S STATEMENT ON LEGISLATIVE COMPETENCE

71. On 24 June 2008, the Presiding Officer (Alex Fergusson MSP) made the following statement:

These documents relate to the Health Board (Membership and Elections) (Scotland) Bill (SP Bill 13) as introduced in the Scottish Parliament on 25 June 2008

“In my view, the provisions of the Health Board (Membership and Elections) (Scotland) Bill would be within the legislative competence of the Scottish Parliament.”

These documents relate to the Health Board (Membership and Elections) (Scotland) Bill (SP Bill 13) as introduced in the Scottish Parliament on 25 June 2008

HEALTH BOARD (MEMBERSHIP AND ELECTIONS) (SCOTLAND) BILL

EXPLANATORY NOTES (AND OTHER ACCOMPANYING DOCUMENTS)

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